A

Tan Kay Soon (in his capacity as the son, heir/beneficiary and executor for the estate of Lo Lek Tuan, deceased, named in the written will 'The Last Will And Testament of Lo Lek Tuan (f)' dated 10 April 2007) v Tan Ching Ling (in his capacity as the son, heir/beneficiary of the estate of the deceased, named in the first will and as alleged son, heir/beneficiary and executor of the alleged second written will 'Last Will and Testament of Lo Lek Tuan' dated 24 August 2017)

B

C

HIGH COURT (JOHOR BAHRU) — SUIT NO JA-22NCVC-203–10 OF 2018

D EVROL MARIETTE PETERS JC

7 MARCH 2020

E *Evidence — Adverse inference — Failure to call material witness — Plaintiff challenged purported second will — Defendant contended plaintiff estopped from challenging second will — Defendant failed to call solicitor who had made known purported second will to beneficiaries — Whether solicitor material witness — Whether adverse inference should be drawn against defendant*

F *Succession — Will — Validity — Plaintiff propounder of first will — Defendant propounder of second will — Defendant challenged first will — Validity of purported second will — Whether plaintiff estopped from challenging purported second will — Whether testator had testamentary capacity when purported second will was executed — Whether purported second will executed by testator — Whether defendant dispelled suspicious circumstances surrounding execution of purported second will*

G

H The plaintiff was the propounder of the first will of the testator whereas the defendant was the propunder of the second will of the testator. The second will was made known to the beneficiaries by an advocate and solicitor, Mr Kent Tan in a meeting conducted on 6 March 2018 ('the meeting'). It ought to be noted that the purported second will did not have the testator's signature on it, but only a thumbprint alleged to be hers. The plaintiff had brought the present action for a declaration that the first will was the correct and valid will of the

I testator; an order for probate to be granted to the plaintiff as executor based on the first will; a declaration that the purported second will was invalid, void and unenforceable, and that it was not the correct and true will of the testator; and general damages to be assessed. The defendant on the other hand filed a counterclaim for a declaration that the purported second will was the correct

and valid will of the testator; an order for probate to be granted to the defendant; injunctive orders; general damages; and special damages. The defendant contended that the purported second Will superseded the first will. The plaintiff in the present case relied on the evidence of the following witnesses: (a) the plaintiff himself; (b) PW2, a witness to the testator's first will; and (c) PW3, a gazetted fingerprint expert. The defendant relied on the evidence of the following witnesses: (i) DW1, the defendant's son; (ii) DW2, the lawyer and managing partner of Messrs Burton Tan Syazwan & Co, who assisted in preparing the purported second Will; (iii) DW3 — DW2's father and also the manager of Messrs Burton Tan Syazwan & Co; (iv) DW4 — the defendant's sister; (v) DW5 — a legal associate at Messrs Burton Tan Syazwan & Co; and (vi) DW6 — the defendant himself. The issues to be considered were: (1) whether the plaintiff was estopped from challenging the purported second will; (2) whether the testator had the testamentary capacity when the purported second will was executed; (3) whether the purported second will was in fact executed by the testator; and (4) whether the defendant had dispelled the suspicious circumstances surrounding the execution of the purported second will.

Held, allowing the plaintiff's claim in part with costs of RM30,000 and dismissing the defendant's counterclaim:

(1) The person who could have been able to shed light on the meeting was Mr Kent Tan, as he was the solicitor who had made known the purported second will to the beneficiaries. Mr Kent Tan, however, was not produced as a witness. Mr Kent Tan was not only relevant to the case, he was material to the defendant's contention that the plaintiff should be estopped from challenging the purported second will. There was no satisfactory explanation on the failure to produce him. Since no explanation was provided regarding the failure to produce Mr Kent Tan as a witness, the inference was that if Mr Kent Tan was in fact produced, his evidence would have been unfavourable to the defendant. As such, an adverse inference was drawn against the defendant for failing to produce Mr Kent Tan (see paras 23, 25 & 27).

(2) It was trite law, that when a will was being challenged, the propounder of the will, who was the defendant in this case, had the legal burden to prove the following: (a) that the testator duly executed the purported second will; (b) that the testator had the testamentary capacity; and (c) to dispel any suspicious circumstances surrounding the execution of the purported second will (see para 28).

(3) The witness who would have been in the best position to determine the testamentary capacity of the testator was DW2, the solicitor who attended to the execution of the purported second will. DW2 admitted that he had not asked the testator pertinent questions such as, whether

the testator was free from any undue influence, coercion or force to make the purported second will. DW2 had only asked general questions and trick questions which were insufficient to establish the testator's testamentary capacity. In the final analysis, the court was of the view that the defendant had failed to adduce any cogent evidence that established the soundness of the testator's mind, memory and understanding (see paras 36–38 & 45).

(4) The defendant's assertion that the thumbprint belonged to the testator was speculative and unsubstantiated. The evidence of the defendant's witnesses was not sufficient to establish the genuineness of the thumbprint, particularly when their testimonies were fraught with doubtfulness and inconsistencies. In addition, the defendant did not adduce opinion evidence through any expert to establish that the thumbprint was that of the testator. It was also undisputed that the testator had never used her thumbprint for a very long time. The testator had signed official documents from 2007–May of 2017 and in fact, the testator had even signed the official documents for the company's financial statement, three months before and after the date of the purported second will, as such, it was odd, highly irregular and suspicious that the testator had suddenly decided to use her thumbprint on the purported second will. The defendant had failed prove that the thumbprint was that of the testator, and that she had in fact executed the purported second will (see paras 59–60, 62 & 64–65).

(5) The defendant had failed to dispelled the following suspicious circumstances surrounding the execution of the purported second will: (a) the use of thumbprint by the testator; (b) the sudden and unplanned execution of the purported second will; (c) the presence of the defendant's family during execution of the purported second will; (d) the purported second will was contrary to the testator's beliefs and intent that the sons should continue with the family legacy and name, whilst the daughters become outsiders once they marry; and (e) the purported second will was translated into a Teochew dialect but the defendant's witnesses themselves admitted in court that the testator preferred documents to be translated into Mandarin (see paras 68, 74, 76, 77, 91 & 93–94).

[Bahasa Malaysia summary

Plaintif adalah pencetus wasiat pertama pewasiat manakala defendan adalah pencetus wasiat kedua pewasiat. Wasiat kedua telah diberitahu kepada para benefisiari oleh peguambela dan peguamcara, En Kent Tan dalam satu pertemuan yang diadakan pada 6 Mac 2018 ('pertemuan tersebut'). Harus diingat bahawa wasiat kedua tersebut tidak mempunyai tandatangan pewasiat di atasnya, tetapi hanya terdapat cap jari yang dikatakan miliknya. Plaintif telah memfailkan tindakan semasa untuk pengisytiharan bahawa wasiat

pertama adalah wasiat pewasiat yang betul dan sah; perintah untuk probet diberikan kepada plaintif sebagai pelaksana berdasarkan wasiat pertama; perisytiharan bahawa wasiat kedua tersebut tidak sah, terbatal dan tidak dapat dilaksanakan, dan bahawa wasiat tersebut bukan wasiat pewasiat yang betul dan benar; dan ganti rugi am yang akan dinilai. Sebaliknya, defendan mengemukakan tuntutan balas untuk pengisytiharan bahawa wasiat kedua tersebut adalah wasiat pewasiat yang betul dan sah; perintah untuk probet diberikan kepada defendan; perintah-perintah injunksi; ganti rugi am; dan ganti rugi khas. Defendan berpendapat bahawa wasiat kedua tersebut telah menggantikan wasiat pertama. Plaintif dalam kes ini bergantung pada keterangan saksi-saksi berikut: (a) plaintif sendiri; (b) PW2, saksi wasiat pertama pewasiat; dan (c) PW3, pakar cap jari yang diwartakan. Defendan bergantung pada keterangan saksi-saksi berikut: (i) DW1, anak defendan; (ii) DW2, peguam dan pengurus rakan kongsi Tetuan Burton Tan Syazwan & Co, yang membantu dalam penyediaan wasiat kedua yang dinyatakan; (iii) DW3 — bapa DW2 dan juga pengurus Tetuan Burton Tan Syazwan & Co; (iv) DW4 — adik defendan; (v) DW5 — rakan sekutu undang-undang di Tetuan Burton Tan Syazwan & Co; dan (vi) DW6 — defendan sendiri. Isu-isu yang perlu dipertimbangkan adalah: (1) sama ada plaintif dihalang untuk mencabar wasiat kedua tersebut; (2) sama ada pewasiat mempunyai kemampuan untuk berwasiat ketika wasiat kedua tersebut dibuat; (3) sama ada wasiat kedua tersebut sememangnya telah dibuat oleh pewasiat; dan (4) sama ada defendan telah menghilangkan keadaan yang mencurigakan semasa wasiat kedua tersebut dibuat.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos RM30,000 dan menolak tuntutan balas defendan:

(1) Individu yang dapat menjelaskan pertemuan tersebut ialah En Kent Tan, kerana dia adalah peguam yang telah memaklumkan berkenaan wasiat kedua tersebut kepada benefisiari. En Kent Tan, bagaimanapun, tidak dikemukakan sebagai saksi. En Kent Tan bukan hanya relevan dengan kes ini, dia juga penting untuk membuktikan dakwaan defendan bahawa plaintif harus dihalang daripada mencabar wasiat kedua tersebut. Tidak ada penjelasan yang memuaskan mengenai kegagalan mengemukakannya sebagai saksi. Oleh kerana tidak ada penjelasan yang diberikan mengenai kegagalan mengemukakan En Kent Tan sebagai saksi, maka kesimpulannya adalah jika En Kent Tan benar-benar dikemukakan, keterangannya tidak memihak kepada defendan. Oleh yang demikian, inferens berbalik dibuat terhadap defendan kerana gagal mengemukakan En Kent Tan (lihat perenggan 23, 25 & 27).

(2) Adalah undang-undang yang mantap, bahawa ketika wasiat dicabar, pencetus wasiat, yang merupakan defendan dalam kes ini, memiliki beban undang-undang untuk membuktikan hal-hal berikut: (a) bahawa pewasiat telah membuat wasiat kedua tersebut; (b) bahawa pewasiat

A mempunyai kemampuan untuk berwasiat; dan (c) untuk menghilangkan segala keadaan yang mencurigakan semasa wasiat kedua tersebut dibuat (lihat perenggan 28).

(3) Saksi yang mungkin berada dalam posisi terbaik untuk menentukan B kemampuan berwasiat adalah DW2, peguamcara yang hadir ketika wasiat kedua tersebut dibuat. DW2 mengakui bahawa dia tidak mengajukan pertanyaan yang relevan kepada pewasiat seperti, sama ada pewasiat bebas dari pengaruh tidak wajar, paksaan atau tekanan untuk membuat wasiat kedua tersebut. DW2 hanya mengajukan soalan umum C dan soalan tipu daya yang tidak mencukupi untuk membuktikan kemampuan untuk berwasiat. Dalam analisis terakhir, mahkamah berpendapat bahawa defendan telah gagal untuk mengemukakan keterangan yang meyakinkan yang membuktikan kewarasan pikiran, ingatan dan pemahaman pewasiat (lihat perenggan 36–38 & 45).

D

(4) Pernyataan defendan bahawa cap jari tersebut adalah milik pewasiat adalah spekulatif dan tidak berasas. Keterangan saksi-saksi defendan tidak cukup untuk membuktikan kesahihan cap jari, terutama apabila keterangan mereka penuh dengan keraguan dan percanggahan. Di E samping itu, defendan tidak mengemukakan apa-apa keterangan pakar untuk membuktikan bahawa cap jari tersebut adalah milik pewasiat. Juga tidak dapat dipertikaikan bahawa pewasiat tidak pernah menggunakan cap jarinya untuk tempoh yang sangat lama. Pewasiat telah menandatangani dokumen rasmi dari tahun 2007–Mei 2017 dan pada F hakikatnya, pewasiat telah menandatangani dokumen rasmi untuk penyata kewangan syarikat, tiga bulan sebelum dan sesudah tarikh wasiat kedua tersebut, oleh itu, adalah aneh, sangat tidak teratur dan mencurigakan jika pewasiat tiba-tiba memutuskan untuk menggunakan cap jarinya pada wasiat kedua tersebut. Defendan telah gagal G membuktikan bahawa cap jari tersebut adalah milik pewasiat, dan bahawa dia sebenarnya telah membuat Wasiat kedua tersebut (lihat perenggan 59–60, 62 & 64–65).

(5) Defendan gagal menghilangkan keadaan mencurigakan berikut yang berkaitan dengan pembuatan wasiat kedua tersebut: (a) penggunaan cap H jari oleh pewasiat; (b) wasiat kedua tersebut dibuat secara tiba-tiba dan tidak dirancang; (c) kehadiran keluarga defendan semasa wasiat kedua tersebut dibuat; (d) wasiat kedua tersebut bertentangan dengan kepercayaan dan niat pewasiat bahawa anak lelaki harus meneruskan warisan dan nama keluarga, sementara anak perempuan menjadi orang I luar setelah mereka berkahwin; dan (e) wasiat kedua tersebut telah diterjemahkan ke dalam dialek Teochew tetapi saksi-saksi defendan sendiri mengakui di mahkamah bahawa pewasiat lebih suka jika dokumen-dokumen diterjemahkan dalam Bahasa Mandarin (lihat perenggan 68, 74, 76, 77, 91 & 93–94).]

Cases referred to

Ang Siew Hock & Ors v Ang Choon Koay [1970] 2 MLJ 149 (refd)
Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh [2000] 5 MLJ 778, HC (refd)
Banks v Goodfellow [1861-73] All ER Rep 47; (1870) LR 5 QB 549, QB (refd)
Choo Mooi Kooi @ Choo Soo Yin v Choo Choon Jin @ Jimmy Choo and other suits [2012] 2 MLJ 691, HC (refd)
Collins Chigbo Chima v PP [2019] MLJU 84; [2019] 1 LNS 107, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (folld)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Ngai Lau Shia v Low Chee Neo (1921) 14 SSLR 35 (refd)
Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)
PP v Hassan Jafarpour [2019] MLJU 281; [2019] 9 CLJ 216, CA (refd)
PP v Kit Chee Wan [1999] 1 MLJ 16, HC (refd)
PP v Saad bin Mat Takraw & Anor [1998] 3 MLJ 784, HC (refd)
Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir' [2012] 5 MLJ 515, HC (folld)
Tan Soh Sim, Deceased; Chan Lam Keo Ng and 4 Others v Tan Saw Keow and 3 Others, In Re [1951] 1 MLJ 21, CA (folld)

Legislation referred to

Evidence Act 1950 ss 45, 52, 56, 57, 57(1), 114(g), 134
Interpretations Act 1948 and 1967 s 3
Registration of Criminals and Undesirable Persons Act 1969
Wills Act 1959 s 5

David Soosay (Yeow & Chin) for the plaintiff.
S Jeyakumar (Tea Kelvin Kang) for the defendant.

Evrol Mariette Peters JC:

THE BRIEF FACTS

[1] The plaintiff, an individual and the son of the testator, was the propounder of 'The Last Will and Testament of Lo Lek Tuan (f)' dated 10 April 2007 ('the first will') which was signed by the testator (exhibited at pp 2–4 of the plaintiff's bundle of documents ('PBD')).

A **[2]** The defendant, the plaintiff's brother, is the propounder of a purported second will, known as 'Last Will and Testament of Lo Lek Tuan' dated 24 August 2017 ('the purported second will') (exhibited at pp 6–8 of the PBD)

B **[3]** The testator died on 3 February 2018, at the age of 81, leaving behind the following sons and daughters:

Tan Ching Ling (son), the defendant (DW6);

C Tan Ah How (son);

Tan Ch'ng Hwa (son);

D Tan Ching Hiong (son);

Tan Kay Soon (son) the plaintiff (PW1)

E Tan Geck Nai (daughter);

Tan Khim Luan Nai (daughter) (DW4);

F Tan Poh Nai Nai (daughter); and

Tan Lee Nai Nai (daughter).

G **[4]** During her lifetime, the testator was the chairperson, single largest majority shareholder, and director of Loh Lek Tuan Sons & Realty Sdn Bhd, the family owned company, which had always been managed and owned by the testator and her sons.

H **[5]** On 10 April 2007, the testator executed her first will. The late Mr Loh Song Chuan ('the late Mr Loh') of Messrs Loh & Renga was the solicitor who prepared the first will, and for the benefit of the testator, had it translated from English to Mandarin. It was also undisputed that Mr Tan Meng Chew (DW3) was, at time, employed at Messrs Loh & Renga as the office manager, and had worked there from 1991–2012/2013.

I **[6]** At all material times, the plaintiff had stayed with the testator at the family home, except between January–December 2016, when she temporarily stayed ('the temporary stay-out') with the defendant and another son, Tan Ching Hiong.

[7] After the death of the testator, on 6 March 2018, a meeting was held at the offices of Messrs Burton Tan Syazwan & Co to discuss the administration of the testator's estate ('the March 2018 meeting'). During that meeting, one Mr Kent Tan, a solicitor at Messrs Burton Tan Syazwan & Co, took conduct of making the purported second will, known to the beneficiaries. Instead of her signature, the purported second will which was said to have been executed on 24 August 2017 at the offices of Messrs Burton Tan Syazwan & Co, contained the testator's thumbprint.

[8] The plaintiff was dissatisfied with the outcome of the March 2018 meeting and sought independent legal advice regarding both wills. The plaintiff and the defendant then proceeded to enter a caveat on the estate of the testator.

[9] Although the defendant had applied for probate of the testator's estate based on the purported second will, that application was subsequently withdrawn due to this present action.

THE CLAIMS

[10] The plaintiff sought, inter alia, the following reliefs:

(a) a declaration that the first will is the correct and valid will of the testator;

(b) an order for probate to be granted to the plaintiff as executor based on the first will;

(c) a declaration that the purported second 2017 will is invalid, void and unenforceable, and that it is not the correct and true will of the testator; and

(d) general damages to be assessed.

[11] The defendant in his counter claim, sought, inter alia, the following:

(a) a declaration that the purported second 2017 will is the correct and valid will of the testator;

(b) an order for probate to be granted to the defendant;

(c) an injunctive order that the plaintiff or anyone holding the properties and documents belonging to the estate of the testator including the company's documents to be given to the defendant;

(d) an injunctive order to prevent the plaintiff from entering any caveat or from preventing or disrupting the distribution and transfer of the estate to beneficiaries pursuant to the purported second 2017 will;

A (e) general damages; and

(f) special damages.

[12] I allowed the plaintiff's claim and dismissed the defendant's
B counterclaim, and the following are my reasons.

THE PLAINTIFF'S CASE

[13] The plaintiff contended that the testator had neither executed nor
C affixed her thumbprint on the purported second will, as there was neither credible nor conclusive evidence to show that the thumbprint was indeed hers.

[14] Instead, the plaintiff claimed, there was overwhelming evidence that pointed to suspicious circumstances surrounding the execution of the
D purported second will that would render the same unenforceable and invalid.

[15] The plaintiff argued that the defendant's witnesses were not credible, as they gave inconsistent, self serving, illogical and evasive testimonies.

E **[16]** It was also submitted that even if the thumbprint was that of the testator, she was unduly influenced, coerced, forced, confused or did not know or understand the contents of the purported second will, when she affixed her thumbprint on it.

F **[17]** The following were called as witnesses for the plaintiff:

(a) Tan Kay Soon (PW1), the plaintiff himself;

(b) Lim Boon Hui (PW2), a witness to the testator's first will; and

G (c) Puwira Jaya bin Othman (PW3), a gazetted fingerprint expert.

THE DEFENDANT'S CASE

[18] The gist of the defendant's case was that the first will was superseded by
H the purported second will, which was executed by the testator on her own free will and without any coercion or force.

[19] The defendant averred that the testator had decided to affix her thumbprint to avoid doubts and misunderstanding amongst her children/
I beneficiaries, and that she had possessed the requisite testamentary capacity at the time of execution to have understood the contents of the purported second will.

[20] The following were called as witnesses for the defendant:

(a) Tan Wei Jian (DW1), the defendant's son;

(b) Tan Hou Xieh Burton (DW2), the lawyer and managing partner of Messrs Burton Tan Syazwan & Co, who assisted in preparing the purported second will;

(c) Tan Meng Chew (DW3) — DW2's father and also the Manager of Messrs Burton Tan Syazwan & Co;

(d) Tan Khim Luan (DW4) — the defendant's sister;

(e) Ko Kai Ju (DW5) — a legal associate at Messrs Burton Tan Syazwan & Co; and

(f) Tan Ching Ling (DW6) — the defendant himself.

CONTENTIONS, EVALUATIONS AND FINDINGS

Whether the plaintiff was estopped from challenging the purported second will

[21] At the outset the defendant contended that the plaintiff was estopped from challenging the purported second will, on the basis that during the March 2018 meeting, when the purported second will 2017 was read at the offices of Messrs Burton Tan Syazwan & Co, the plaintiff had agreed to seek probate and to become the executor for the purported second 2017 will.

[22] The plaintiff vehemently denied this allegation and claimed that when he attended the March 2018 meeting, he had not fully understood the contents of the purported second will, and had raised concerns regarding the thumbprint. However, he had not received any satisfactory response. Furthermore, at that time, he did not have legal representation.

[23] In my view, the person who could have been able to shed light on the March 2018 meeting was Mr Kent Tan, as he was the solicitor who had made known the purported second will to the beneficiaries at that meeting. Mr Kent Tan, however, was not produced as a witness.

[24] In this connection, reference is made to illustration (g) of s 114 of the Evidence Act 1950 ('the Evidence Act'), which reads:

> Section 114 — Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume:

(g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

[25] As stated by the Supreme Court in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the evidence that is referred to in s 114(g) of the Evidence Act must not only be relevant, it must be material. In my view, Kent Tan was not only relevant to the case, he was material to the defendant's contention that the plaintiff should be estopped from challenging the purported second will. Yet, there was no satisfactory explanation on the failure to produce him.

[26] I also find instructive the case of *Sabah Shell Petroleum Co Ltd & Anor v The Owners of and/or Any Other Persons Interested in the Ship or Vessel the 'Borcos Takdir'* [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (as she then was):

> ... The person best placed to explain fully the events of the day would have been the master but the defendant failed to call the master as witness. Stating that he was uncooperative. Given the importance of this witness' evidence, *the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely*. This was a fit and proper case for this court to draw an adverse inference under s 114(g) against the defendant ... (Emphasis added.)

[27] Since no explanation was provided regarding the failure to produce Kent Tan as a witness, the inference was that if Kent Tan was in fact produced, his evidence would have been unfavourable to the defendant. As such, an adverse inference is drawn against the defendant for failing to produce Kent Tan.

The burden of proof

[28] With regard to the purported second will, it is trite law, that when a will is being challenged, the propounder of the will, who is the defendant in this case, has the legal burden to prove the following:

(a) that the testator duly executed the purported second will;

(b) that the testator had the testamentary capacity; and

(c) to dispel any suspicious circumstances surrounding the execution of the purported second will.

[29] It is also settled law that if a propounder of a Will is able to prove execution and testamentary capacity as well as dispel suspicious circumstances,

then, the burden shifts to the party who is challenging the will, to prove on a balance of probabilities the vitiating elements like undue influence, coercion or fraud.

[30] In this respect, I find instructive the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, where it was stated by Steve Shim CJ:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law, ie that where the validity of a will was challenged, *the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will;* that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will. In this connection, we find the approach taken by the High Court of Australia in *William Henry Bailey & Ors v Charles Lindsay Bailey & Ors* (1924) 34 CLR 558 to be instructive. Therein Isaacs J said *inter alia*:
>
> (1) The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged, the court is bound to pronounce against the instrument.
>
> (2) This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence.
>
> (3) The proponent's duty is, in the first place, discharged by establishing a prima facie case.
>
> (4) A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator.
>
> (5) A man may freely make his testament, howsoever old he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments.
>
> (6) The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the court varies with the circumstances.
>
> (7) As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit.
>
> (8) Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party

impeaching the will to show that it ought not to be admitted to proof.

(9) To displace a *prima facie* case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing his property.

(10) The opinion of witnesses as to the testamentary capacity of an alleged testator is usually for various reasons of little weight on the direct issue.

(11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the court must judge from the facts they state and not from their opinions.

[31] Reference is also made to *Choo Mooi Kooi @ Choo Soo Yin v Choo Choon Jin @ Jimmy Choo and other suits* [2012] 2 MLJ 691, where it was stated that the propounder of the will has the burden: (a) to prove testamentary capacity; (b) to prove due execution of the will; and (c) to dispel any suspicious circumstances that surrounded the making of the will.

Whether the testator had the testamentary capacity when the purported second will was executed

[32] The meaning of 'testamentary capacity' was explained by Cockburn CJ in *Banks v Goodfellow* [1861-73] All ER Rep 47; (1870) LR 5 QB 549, in the following words:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made ... In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of ...

[33] The defendant submitted that the testator's testamentary capacity was not in doubt, in view of the fact that she was the chairperson, single largest majority shareholder, and director of Loh Lek Tuan Sons & Realty Sdn Bhd, the family owned company, which had always been managed and owned by the testator and her sons.

[34] I find this contention misconceived, bearing in mind that even if the testator was of sound mind, it was imperative for the defendant to prove, and not presume that she had the testamentary capacity *at the time* of the alleged execution.

[35] The defendant's witnesses, through their testimony in court, attempted to establish the testator's testamentary capacity. However, it was my finding that none of them had convinced the court on a balance of probability that the testator had the testamentary capacity at the time the purported second will was executed.

[36] In my view, the witness who would have been in the best position to determine the testamentary capacity of the testator was DW2, Burton Tan, the managing partner of Messrs Burton Tan Syazwan & Co, and the solicitor who attended to the execution of the purported second will.

[37] Instead of asking appropriate questions to determine the testator's soundness of mind, memory and understanding, DW2 merely asked general questions such as 'Aunty are you not feeling well?' and trick questions. These trick questions were deliberate and inaccurate suggestions about the number of children she had, to test how lucid she was. However, there were no contemporaneous notes of such questions and answers, produced in court. In any event, it is my view that these questions were insufficient to establish the testator's testamentary capacity.

[38] DW2 also admitted not having asked the testator pertinent questions such as, whether the testator was free from any undue influence, coercion or force to make the purported second will. Furthermore, it was confirmed by DW2 that he had not brought to the attention of the testator, matters regarding the first will, which was a vital fact to test her memory and understanding of what she was executing. This was confirmed by DW2.

[39] The other witnesses, in my view, were not in a position to testify to the testator's testamentary capacity. DW1, the son of the defendant, who claimed to be present during the execution of the purported second will, claimed that the testator was a person of sound mind at the time of the execution, but was unable to explain the basis of his opinion, and this, therefore remained a bare averment.

[40] In fact, after evaluating and assessing the evidence of DW1, it is my finding he was not an independent witness to testify on whether the testator was of sound mind, memory and understanding. It was obvious that he was testifying only to boost the defendant's case.

A **[41]** DW3, Tan Meng Chew, the father of DW2, and manager of Messrs Burton Tan Syazwan & Co, testified that the testator was mentally sound and fit during the execution on the basis that she greeted him with a smile and she looked happy.

B **[42]** In my view, DW3's position did not equip him with the capability or qualification to assess the mental soundness and fitness of the testator. He failed to prove the alleged questions posed to the testator to verify her sound mind, memory and understanding. He had also failed to produce the purported notes, which were allegedly kept in the office file. In my view, DW3's testimony **C** regarding the testator's testamentary capacity at the time of the execution of the purported second will, was unsubstantiated.

[43] DW4, Tan Khim Luan, one of the daughters of the testator, alleged that she was present during the execution of the purported second will but had no **D** knowledge regarding the sequence of events. Furthermore, she contradicted herself, and in many instances, either refused to answer or gave illogical responses. She was not reliable at all. In any event, it was undeniable that DW4 was not qualified to determine the mental frame of mind of the Testator at the material time.

E

[44] The evidence of the defendant himself as the propounder of the purported second will, was unsupported by any independent evidence. He claimed that the alleged questions posed to the testator by DW2 was answered **F** clearly and concisely by the testator. However, when he was cross-examined on this aspect, he could not remember the questions, which in any event, in my view, were not sufficient to test the testamentary capacity of the testator.

[45] In the final analysis, on the issue of the testator's testamentary capacity, **G** it is my view that the defendant had failed to adduce any cogent evidence that established the soundness of the testator's mind, memory and understanding.

Whether the purported second will was in fact executed by the testator

H **[46]** This issue arose because the purported second will did not have the testator's signature on it, but only a thumbprint alleged to be hers.

[47] Applying the law on proof, the defendant had the burden to show that the testator had executed the purported second will, as prescribed by s 5 of the **I** Wills Act 1959, which reads:

Section 5 — Mode of execution

(1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.

(2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:

[48] In the present case, the purported second will was not signed by the testator. However according to s 3 of the Interpretations Act 1948 and 1967, 'sign' includes the making of a mark or the affixing of a thumbprint. The issue, therefore, was whether the thumbprint was actually the testator's.

[49] The defendant, contended that the testator had in fact affixed her thumbprint, and that this was witnessed by the defendant's witnesses.

[50] In my view, the defendant's witnesses lacked credibility and were not independent. I was, therefore, unable to accept the evidence of the defendant's witness that the testator had in fact affixed her thumbprint to the purported second will, for the following reasons.

[51] During cross-examination, DW2 claimed that there was a standard operating procedure ('SOP') of Messrs Burton Tan Syazwan & Co that required all clients to place their thumbprint on wills prepared by them. When asked the reason for having such an SOP, DW2 explained that his firm Messrs Burton Tan Syazwan & Co prepared wills on a daily basis and regardless of the clients' age, all of them were required to affix their thumbprint on wills that they had executed.

[52] I was unable to accept the explanation by DW2. In fact, I found it implausible and absurd that a law firm in Pontian, Johor would be receiving instructions on wills on a daily basis. In any event, there was no proof of such SOP as it was never produced in court.

[53] Furthermore, the fact that Messrs Burton Tan Syazwan & Co were the solicitors for the defendant in this action (until November 2018) is a fact that cannot be ignored in my conclusion that DW2 was not an independent witness in this trial and was much aligned with the defendant.

[54] DW3, Tan Meng Chew, also lacked credibility and neutrality. He was evasive at times, and defensive when suggestions were put to him. In fact, the court had to remind him several times during the proceedings that he was merely a witness and not the litigant himself. His demeanour and answers

indicated that he was biased in favour of the defendant. I had also observed during trial, that there were signals and communication between DW3, in the witness box, and the defendant who was in the gallery. In my view, this had severely compromised the credibility of the evidence of DW3.

[55] With regard to DW1, minimal weight was attached to his evidence, as it was apparent that he testified to support his father's claim.

[56] DW4's credibility was highly questionable, as she had admitted that her witness statement was prepared and translated to her on the day of the trial and that she had amended parts of her statement at the eleventh hour. Her statements were riddled with contradictions and when questioned further, she provided the ubiquitous 'tak tau'.

[57] The defendant himself did not impress me as a truthful witness. He contradicted himself and strayed from the issues. It was obvious that he was heavily invested in the case, and had no qualms in casting aspersions on the plaintiff, in his verbal attacks directed to the plaintiff. It was obvious that there was no love lost between the brothers, as the defendant referred to the plaintiff as 'a very bad person, violent, a gangster and that he was wanted by the police.'

[58] The defendant was cautioned several times to answer the questions and not to go on a frolic of his own, bearing in mind that even if those allegations towards the plaintiff were true, they were absolutely irrelevant by virtue of s 52 of the Evidence Act, and hence inadmissible. Section 52 reads:

> Section 52 — In civil cases character to prove conduct imputed irrelevant
>
> In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except so far as his character appears from facts otherwise relevant.

[59] As such, the defendant's assertion that the thumbprint belonged to the testator was speculative and unsubstantiated. The evidence of the defendant's witnesses was not sufficient to establish the genuineness of the thumbprint, particularly when their testimonies are fraught with doubtfulness and inconsistencies, as addressed above.

[60] A glaring aspect of the defendant's case is that he did not adduce opinion evidence through any expert to establish that the thumbprint was that of the testator. In fact, it was the plaintiff who had produced an expert witness, Puwira Jaya bin Othman ('PW3'), a gazetted fingerprint expert on the veracity of the thumbprint purported to be that of the testator. Since PW3 was a gazetted expert under the Registration of Criminals and Undesirable Persons Act 1969, he was not within the purview of s 45 of the Evidence Act and, there

was, therefore, no need to establish his expertise, as explained in *Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784; and *Public Prosecutor v Kit Chee Wan* [1999] 1 MLJ 16.

[61] PW3 had explained his findings and concluded that:

(a) no comparison could be made, as the purported thumbprint had no characteristics to match with the existing records of the testator's thumbprint; and

(b) that it could have been anyone's thumbprint, as his findings were inconclusive (PW3's report exhibited at p 10 of the PBD).

[62] The further facts that supported the contention that the thumbprint could not have been the testator's is the undisputed fact that the testator had never used her thumbprint for a very long time, due to the fact that its characteristics or ridges had faded away and as such, was not capable of being used for any official purpose.

[63] The defendant contended that the testator was at liberty to choose her style of signature on the purported second will or in respect of any documents, for that matter, especially since a thumbprint, being an unforgeable signature, was the safest way for the testator to execute a will. Furthermore, the defendant claimed that the testator had probably considered the situation of her family including the squabbles amongst her children, and as such, decided to use her thumbprint to avoid any future disputes and doubts regarding the purported second will.

[64] I am unable to accept the defendant's submission regarding the thumbprint. The fact that she did not use her thumbprint and preferred to sign was indicated by the company's director's report and financial statements for year ended 2006–2016, wherein the testator had signed official documents from 2007–May of 2017. The documentary evidence revealed that as early as 2006, the testator has been placing her signatures on official documents and payment vouchers (exhibited at pp 1–78 of Vol 2 of the PBD).

[65] In fact, the testator had even signed the official documents for the company's financial statement, three months before and after the date of the purported second will. It was, therefore, odd, highly irregular and suspicious that the testator had suddenly decided to use her thumbprint on the purported second will. As such, the defendant had failed prove that the thumbprint was that of the testator, and that she had in fact executed the purported second will.

Whether the defendant had dispelled the suspicious circumstances surrounding execution of the purported second will

[66] The plaintiff submitted that there were several suspicious circumstances that surrounded the making and execution of the purported second will, circumstances that would render the same unenforceable and invalid.

[67] In my view, the following were the facts that rendered the circumstances suspicious.

First suspicious fact — The thumbprint

[68] The circumstances relating to the thumbprint, and the reasons for saying that it was uncharacteristic of her to use her thumbprint as alluded to earlier, had given rise to suspicion, which in my view the defendant had failed to dispel.

Second suspicious fact — The sudden and unplanned execution of the purported second will

[69] With regard to the sequence of events that led to the execution of the purported second will, the defendant provided confusing, contradictory, and illogical versions of what purportedly transpired on 24 August 2017, from the time he fetched the Testator from her home, until he had reached the offices of Messrs Burton Tan Syazwan & Co.

[70] The defendant initially said he had fetched the testator from her home and had taken her to town. However, according to the defendant, at that point in time, there had been no plans as yet to execute the purported second will. The defendant later averred that the drive to town was to have breakfast and it was during that time, that the testator had informed him that she wanted to make a trip to the offices of Messrs Burton Tan Syazwan & Co to execute a will. At another point of time during cross-examination, the defendant backpedalled and averred that he knew of the testator's intention to execute a will only upon reaching the offices of Messrs Burton Tan Syazwan & Co.

[71] The defendant's narrative of what transpired on the morning of 24 August 2017 was bizarre and absurd, not to mention contradictory. Executing a will is a solemn and serious task, and one that takes time, especially in this case where the testator had intended to override the first will executed ten years ago. Since the execution involved the expertise of lawyers, it was reasonable to assume that an appointment was required to be scheduled to ensure the solicitors' and witnesses' availability. It was, therefore, unusual that no prior appointment was made with Messrs Burton Tan Syazwan & Co, and odd that

the defendant had not queried the testator of her intention to visit the offices Messrs Burton Tan Syazwan & Co, during their journey to the law firm.

[72] In my analysis of the defendant, I found that he was not forthright in his answers and narration of the purported events from the time he fetched the testator from her home, to the time he reached the offices of Messrs Burton Tan Syazwan & Co. In any event, even if the defendant's narrative was true, the execution of the purported second will in such a hasty and abrupt manner raises serious questions regarding the requisite testamentary capacity of the testator, which as I had concluded earlier, had not been established by the defendant.

[73] Adding to the suspicion is the contradictory position taken by DW1, who disagreed with the suggestion that there was no mention of executing a will when the testator was fetched from her home on 24 August 2017. DW1's disagreement with this suggestion contradicts the evidence of the defendant.

[74] As such, it is my view that the sudden and unplanned execution of the purported second will had aroused curiosity and suspicion, which the defendant had failed to dispel.

Third suspicious fact — Presence of the defendant's family during execution of the purported second will

[75] The defendant averred that a total of four family members along with the testator arrived at the offices of Messrs Burton Tan Syazwan & Co on 24 August 2017, to execute the purported second will.

[76] The defendant and members of his family, including DW4, ought not to have been present in the room during the execution of the purported second will. Although DW4 and the defendant were not witnesses to the will, as beneficiaries, their presence in the room during the time of execution was highly irregular and improper, and provided the defendant with an opportunity to have unduly influenced, forced or coerced the testator into executing the purported second will. This is compounded by the exclusion of the other children of the testator, and the fact that the defendant and DW4 had stood to inherit more under the purported second will.

Fourth suspicious fact — The purported second will was contrary to the testator's beliefs and intent

[77] It was undisputed that the testator was a conventional person who held on to traditional Chinese customs, values and practices. This was vouched by

A the plaintiff who claimed that the testator believed that the sons should continue with the family legacy and name, whilst the daughters become outsiders once they marry.

B **[78]** The first issue is whether such custom or tradition exists. At this juncture, it is pertinent to note that by virtue of s 57 of the Evidence Act, the court may take judicial notice of facts which are of general and common knowledge. 'When a court takes judicial notice of a fact, it simply means that the court declares that it will find that the fact exists': per Abdul Malik Ishak J (as he then was) in *Bank Bumiputra (M) Bhd v Mohd Ibrahim bin Salleh* [2000] 5 MLJ 778.

C

[79] Facts which the court shall take judicial notice of are found in s 57(1) of the Evidence Act, which reads:

D Section 57 — Facts of which court must take judicial notice

(1) The court shall take judicial notice of the following facts:

(a) all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in Malaysia or any part thereof;

E

(b) all public Acts passed or hereafter to be passed by the Parliament of the United Kingdom, and all local and personal Acts directed by it to be judicially noticed;

(c) articles of war for the armed forces or any visiting force lawfully present in Malaysia;

F

(d) the course of proceedings in Parliament, in the federal legislatures that existed in Malaysia before Parliament was constituted, in the legislature of any State in Malaysia and in the Parliament of the United Kingdom;

G

(e) the accession of the Yang di-Pertuan Agong and the accession of the Ruler of any state in Malaysia and the appointment of a Yang di-Pertua Negeri;

(f) the accession and the sign manual of the sovereign for the time being of the United Kingdom;

H

(g) the seals of all the courts of Malaysia, all seals which any person is authorised to use by any law in force for the time being in Malaysia or any part thereof, all seals of which English courts take judicial notice, and the seals of Courts of Admiralty and maritime jurisdiction and of notaries public;

I

(h) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of Malaysia, if the fact of their appointment to such office is notified in the Gazette or in any State Gazette;

(i) the existence, title and national flag of every state or sovereign recognised by the *Yang di-Pertuan Agong*;

(j) the ordinary course of nature, natural and artificial divisions of time, the geographical divisions of the world, the meaning of Malay and English words, and public festivals, fasts and holidays notified in the Gazette or in any State Gazette;

(k) the Commonwealth countries;

(l) the commencement, continuance and termination of hostilities between Malaysia or any part of the Commonwealth and any other country or body of persons;

(m) the names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates and other persons authorised by law to appear or act before it;

(n) the rules of the road on the land, sea regulations and the rules of the air;

(o) all other matters which it is directed by any written law to notice.

[80] Section 57 of the Evidence Act merely sets out matters which the court must take judicial notice of, but the list therein is not exhaustive 'The court under s 56 of the Evidence Act may also take judicial notice of matters which are of common and general knowledge': per Hashim Yeop Sani FCJ in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 (FC).

[81] The manner in which the court should take judicial notice of facts was expounded by Syed Agil Barakbah J in *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30:

> The important point to note is that s 57 does not prohibit the courts from taking judicial notice of other facts not mentioned therein. The matter which the court will take judicial notice must be the subject *of common and general knowledge and its existence or operation is accepted by the public* without qualification or contention. The test is that the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof. (Emphasis added.)

[82] A vital criterion of the fact taken judicial notice of is that sufficient notoriety must be attached to it, so as to make it proper for the court to assume its existence without proof. I am, therefore, of the view that judicial notice may be taken of the fact that according to Chinese tradition and custom, the substantive part of the inheritance such as immovable properties and shares should always remain within the male lineage, whilst the daughters are to inherit movable properties such as monies and jewelleries.

[83] The defendant submitted that this was an area best left to the expert under s 45 of the Evidence Act. I am unable to agree with the defendant, in view of the fact that the issue that needs to be addressed in this case concerns Chinese customs and tradition, whereas the reference the defendant made to s 45 is foreign law. At this juncture, I looked to the cases of *Ngai Lau Shia v Low Chee Neo* (1921) 14 SSLR 35 and *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153, where judicial notice was taken respectively of the polygamous nature of Chinese customary marriages, and the fact that Chinese funeral expenses vary according to the status of the deceased.

[84] I am guided also by the case of *In Re Tan Soh Sim, Deceased; Chan Lam Keo Ng and 4 Others v Tan Saw Keow and 3 Others* [1951] 1 MLJ 21 which was adopted in *Ang Siew Hock & Ors v Ang Choon Koay* [1970] 2 MLJ 149. In the former case, it was stated by Taylor J:

> *Chinese custom is founded on patriarchal families and clans and the dominant motive for adoption of a son is to ensure that the family ancestor worship will be duly carried on.*
>
> A person is either a member of the family or outside it. When a girl is married she leaves her father's house and goes to reside in the house of her husband's father or grandfather. Her first ceremonial duty is to worship at the family shrine and her second is to kowtow to her husband's parents and elders; then his juniors in the family kowtow to her. All this is symbolic of the fact that she has been married into the family and is expected never to leave it. If her husband should die, however young, his brothers will still maintain her for the rest of her life.
>
> *The customs affecting property conform naturally to the family principle. All the sons inherit equally. The daughters do not inherit at all.* (Emphasis added.)

[85] The next issue was whether the testator had in fact subscribed to such custom and tradition. The plaintiff testified that the testator had always believed in following such customs and tradition, and this was made known to the plaintiff during her causal conversations with him.

[86] In my view, the plaintiff would be the best person to know what customs and tradition that the testator had subscribed to, since he stayed with (except for the temporary stay out) and looked after the testator for many years.

[87] I found the plaintiff to be earnest in his answers. Whatever contradictions that arose in his evidence were explained by him to the satisfaction of court, during re-examination. Although the defendants' witnesses had attempted to cast a negative light on the plaintiff, in my view, his evidence had withstood the test of cross-examination.

[88] In fact, the plaintiff was corroborated by DW4, who conceded that the testator had believed in and subscribed to such customs and tradition, where the sons were favoured over the daughters with regard to inheritance.

[89] The plaintiff's evidence was further strengthened by the contents of the testator's first will wherein she had not only rendered her sons named as executors and trustees, but had also bequeathed to them immovable properties, and company shares; whereas her daughters received only monies in the testator's savings account. In my view, the first will was the testator's voice from the grave indicating her beliefs in Chinese customs and tradition.

[90] Furthermore, in view of the fact that the testator was a septuagenarian when the first will was executed, and belonged to an era where tradition and customs were followed and adhered to strictly, there was a very high degree of probability that she had still subscribed to such customs and tradition when the purported second will was executed ten years later in 2017; and on that basis, the contents of the purported second will were misaligned with such beliefs, which had raised doubts on the veracity, authenticity and validity of the purported second will.

Fifth suspicious fact — The language used in the purported second will

[91] The language employed in the purported second will was an additional fact that needed to be heeded. Whilst the first will was translated into Mandarin, the purported 2017 will was translated into the Teochew dialect.

[92] The defendant submitted that since the testator was well-versed in both dialects, there was no basis for any suspicion.

[93] I am unable to agree with this submission, in view of the fact that the defendant's witnesses themselves admitted in court that the testator preferred documents to be translated into Mandarin, and that it was uncharacteristic of her to employ Teochew in an official document such as a will. In my view, therefore, the use of the Teochew dialect in the purported second will created suspicion which the defendant had failed to dispel.

[94] Looking at all the facts surrounding the execution of the purported second will, it is my view that they were suspicious, and which the defendant had failed to dispel.

SUMMARY OF FINDINGS

[95] Despite the number of witnesses called on behalf of the defendant, he had failed to prove on a balance of probability the testamentary capacity of the testator and that the thumbprint affixed to the purported second will belonged to testator. He had also failed to dispel the suspicious circumstances surrounding the execution of the purported second will. This is a reminder that evidence should be weighed and not counted, and that quality before quantity,

as stipulated in s 134 of the Evidence Act, which reads:

> Section 134 — Number of witnesses
>
> No particular number of witnesses shall in any case be required for the proof of any fact.

[96] The importance of s 134 was highlighted in several cases including *Collins Chigbo Chima v Public Prosecutor* [2019] MLJU 84; [2019] 1 LNS 107, and *Public Prosecutor v Hassan Jafarpour* [2019] MLJU 281; [2019] 9 CLJ 216.

[97] At this juncture, reference is made to *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 where in dealing with the issues concerning validity of wills, Jeffrey Tan J (as he then was), succinctly laid down the importance of a credible witness:

> Section 134 [of the Evidence Act] follows the maxim, *testimonia ponderanda sunt non numeranda*, that testimony is to be weighed and not counted '... more regard is to be paid to the character of the evidence adduced in support of case than to the number merely of the witness who gave it; for the *evidence of two respectable and credible witnesses is of more value than of a dozen witnesses of notoriously abandoned and profligate character*'.
>
> (*Trayner's Latin Maxims* at p 599) '... *the court is concerned with the quality and not quantity of evidence*' [*Sarkar* at p 1958]. The weight to be attributed to evidence, *testibus non testimoniis credendum est*, 'depends upon the character and credibility of a witness more than upon the probability or improbability of his statements. The value of the evidence given is to commensurate with the honesty and truthfulness of the witness; evidence as to an improbable fact spoken to by a witness above all suspicion deserves and receives more weight than the evidence of a doubtful or incredible witness regarding a fact itself very probable' (*Trayner's Latin Maxims* at p 599).

[98] In light of my findings above, I found it unnecessary to delve into the issues of whether the plaintiff had proved that the testator was unduly influenced, forced or under coercion or duress when she executed the purported second will.

CONCLUSION

[99] Based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, both oral and documentary, and submissions of counsel for both parties, except for the relief of general damages which, in my view, was neither justified nor proved, the plaintiff's claim was allowed with costs in the amount of MYR30,000 (subject to allocatur fees), whilst the defendant's counterclaim was dismissed.

Plaintiff's claim allowed in part with costs of RM30,000; defendant's counterclaim dismissed.

Reported by Dzulqarnain bin Ab Fatar